89-1606

No. _____

In The

Supreme Court of the United States

October Term, 1989

MODEL MAGAZINE DISTRIBUTORS, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

HERALD PRICE FAHRINGER
DIARMUID WHITE
540 Madison Avenue
New York, New York 10022
(212) 751-1330

RALPH J. SCHWARZ, JR.
122 E. 42nd Street,
New York, New York 10168
(212) 867-8850

Attorneys for Model Magazine Distributors, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

When a subpoena, seeking records related to activities protected by the First Amendment, is challenged on the grounds that the documents sought are unrelated to the criminal investigation, must the government demonstrate that records demanded are "substantially" related to the grand jury investigation?

PARTIES TO THE PROCEEDINGS

In addition to the named parties in this cross-petition for certiorari, R enterprises, Inc. and MFR Court Street Books, Inc. were parties in the courts below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

No. _____

In The

Supreme Court of the United States

October Term, 1989

MODEL MAGAZINE DISTRIBUTORS, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Model Magazine Distributors, Inc. *cross-petitions* for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, is reproduced in the appendix of the Solicitor General's petition for certiorari, No.89-1436, (App. 1a-15a), and is reported at 884 F.2d 772. Earlier opinions of the Court of Appeals are also

reproduced in the Solicitor General's petition for certiorari (App. 16a-18a and 19a-56a) and are reported, respectively, at 844 F.2d 202 and 829 F.2d 1291.

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was entered on August 31, 1989. A petition for rehearing was denied on December 12, 1989 (App. 68a-69a). The Solicitor General's petition for certiorari was filed on March 12, 1990, and served on counsel for the respondent on March 14, 1990. Thus, this cross-petition for certiorari is timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

RULE INVOLVED

Rule 17(c) of the Federal Rules of Criminal Procedure provides, in pertinent part, as follows:

> (c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents, or objects or portions thereof to be inspected by the parties and their attorneys.

STATEMENT OF THE CASE

Model Magazine Distributors, Inc., is a wholesale distributor of adult magazines, paperback books, and video tapes in New York City. Virtually all of its customers are located in New York and in the northeastern part of the United States.[1] Less than one percent of its sales

---

[1] Model has roughly 3,500 to 4,000 customers who purchase either magazines, paperbacks or videotapes from it. At least half of these customers are located exclusively in New York State and the remaining accounts are located in the northeastern part of the United States. (13) The New York State retail accounts constitute approximately sixty percent of Model's income. (13)

were made in the state of Virginia. (16-17)[2] Since October of 1986 Model has shipped no merchandise to Virginia.

In 1986, a series of subpoenas were served on Model, demanding that it produce over 2,000 videotapes and virtually all of its business records – totalling over 400,000 documents.[3] In response to the subpoena Model delivered to the Virginia grand jury:

> (1) all of its tax returns for the years 1980 through 1985;
>
> (2) all of its records of sales and shipments to firms in Virginia;
>
> (3) all records of its shipments to B & D Corporation in Maryland;
>
> (4) Model stock certificates and corporate minute books, and;
>
> (5) a listing of all its assets; all lease agreements; stock redemption agreements; and records of loans made. (15-19; 624-626; 669)

---

[2] Refers to the pages of the Joint Appendix in the United States Court of Appeals for the Fourth Circuit.

[3] Model issues approximately 250 checks each week, or between 12,000 to 13,000 each year, in addition to the many deposit tickets, debit/credit memos and other banking records that a business normally keeps. (14) Model's shipment of paperback books, magazines and videotapes generate roughly 800 to 900 invoices each week, or conservatively, over 40,000 a year. (13) It is not possible to separate invoices dealing with the shipment of paperback books and magazines from those invoices relating to videotapes. All of Model's records are kept in the name of the customer. (14) In short, there are, for any one year, over 100,000 separate documents relating to the operation of Model's business.

It also advised the Government that it had no consulting agreements or expense records covering travel and entertainment in the state of Virginia. However, it declined to produce all of its videotapes and the 400,000 documents related to sales in New York and other eastern states. To have complied with these subpoenas would have brought a complete halt to Model's circulation of magazines and videotapes. (212, 213)

Model filed a motion to quash the subpoena, setting forth in elaborate detail why, under this Court's decisions, the subpoena was over broad. Nevertheless, the motion was denied. Model was held in contempt, and an appeal was taken to the Fourth Circuit. On September 24, 1987, the Fourth Circuit reversed the judgments of contempt because the subpoenas were impermissibly vague and over broad. On November 6, 1987, the Government filed a petition for rehearing together with a suggestion for rehearing *in banc*. That application was denied on April 19, 1988.[4]

THE SECOND SERIES OF SUBPOENAS

In the Spring of 1988, the prosecutor struck once again, by serving subpoenas on Model, this time requiring the production of 193 videotapes and over 100,000

[4] In denying the Government's petition for rehearing, the court confined its "holding" to the impermissible vagueness and overbreadth of the "lascivious (lustful lewd)" terminology, but the court did not withdraw its earlier panel opinion. 844 F.2d at 203.

documents unrelated to Virginia.[5] Also subpoenaed were a small retail bookstore in Brooklyn and a Manhattan firm – both of which had no dealings with the state of Virginia – demanding *all* of their records. Model agreed to produce all of its sales records and banking documents relating to any business transactions in Virginia, but resisted producing *all* other records having nothing to do with that state. (208)

On June 14, 1988, a second motion was made to quash the four items left open, among the 15 originally demanded, on the grounds that there was no showing of how these records were *relevant* to the grand jury's investigation of the sales of obscene materials in Virginia. This application was supported by *verified* facts of how the records requested could not possibly be related to a grand jury's inquiry in Virginia. (194-224) Model also asserted that to comply with the subpoena would impose

---

[5] The subpoenas at issue require that Model produce the following:

> (1) All of its sales journals concerning sales to businesses *outside* the state of Virginia and mostly located in New York City. (23-24)
>
> (2) All of its banking records covering a four-year period and amounting to close to 50,000 documents. (14)
>
> (3) All of its records relating to purchases of goods for resale, consisting of some 19,000 documents. (14, 18)
>
> (4) All of Model's records concerning payments of value to any person or entity including, but not limited to, all 1099, W-2 and 941 forms. (237-238)

an unlawful prior restraint on the distribution of materials protected by the First Amendment. (212, 213) The prosecutor, without denying any of the facts set for in Model's papers, took the position the Government did not have to demonstrate any relevancy. (85, 408, 523, 649) The motion to quash was denied and on August 12, 1988, Model was held in contempt. (320, 329).

Once again Model was forced to take refuge in the Fourth Circuit, and on August 31, 1989, the court vacated the contempt convictions for MFR Court Street Books, Inc. and R. Enterprises, Inc. (App. 1a-15a) It reversed the contempt judgment against Model for the 193 videotapes on the grounds that the prosecutor made absolutely no showing that there was any basis for believing that these tapes were obscene.

However, the Fourth Circuit rejected Model's argument that when a subpoena is challenged on the grounds that the documents sought are unrelated to the investigation, under the First Amendment and Fourth Amendment, the Government must make some showing that the records requested will reveal criminal activities in Virginia.

As indicated earlier, the Solicitor General filed a petition for certiorari from the decision of the United States Court of Appeals for the Fourth Circuit on March 12, 1990. This cross-petition is limited to that portion of the Fourth Circuit's decision requiring Model to produce the bulk of its business records. It is filed within the time limit set by Rule 12.5 of this Court's Rules. In a few words that is what this case is all about.

REASONS FOR GRANTING THE WRIT

This case presents a question never before addressed by this Court which may be simply stated as follows:

> When a subpoena, seeking records related to activities protected by the First Amendment, is challenged on the grounds that the documents sought are unrelated to the criminal investigation, must the government make some showing that records demanded are "substantially" related to the grand jury investigation?

In an unbroken series of cases extending over a long stretch of this Court's history it has been held postulate that any prior restraint imposed upon the distribution of materials protected by the First Amendment comes to this Court bearing a heavy presumption against its legality. *See, e.g., Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). As a consequence, this Court has fashioned procedural devices that strike a balance between the state's right to enforce the criminal law and the public's right to read and see what it pleases.

For instance, the law provides that there can be no interference with the circulation of books or films unless there is a preliminary determination of obscenity reached by a judicial officer which "focuses searchingly on the question of obscenity."[6] Where a distributor of books and

---

[6] *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Lee Art Theater, Inc. v. Virginia*, 392 U.S. 636 (1968); *Heller v. New York*, 413 U.S. 483 (1973); *Roaden v. Kentucky*, 413 U.S. 496 (1973); *Lo-ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); *Walter v. United States*, 447 U.S. 649 (1980); *New York v. P. J. Video*, 475 U.S. 868 (1986).

films contests a subpoena on the grounds that the records sought have absolutely no relationship to the criminal investigation, then the government must make some showing of relevance. We recognize that such a showing need not be as stringent as that applied by this court to the First Amendment materials themselves. But certainly some showing of relevance must be made before such a massive demand for documents is authorized.

When a grand jury investigation impinges upon activities protected by the First Amendment, this Court has held that a prosecutor must show that there is "a *substantial* relation between the information sought and a subject of overriding and compelling state interest." *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972) (emphasis supplied). In the *Branzburg* case the Court sustained the grand jury subpoena over First Amendment claims only because the information sought related "directly" to the criminal conduct being investigated. 408 U.S. at 701, 708.

In a similar situation the Ninth Circuit, in a well reasoned opinion, embraced this principle. *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972). There the court held that questions addressed to the identification of those persons responsible for the publication of a newspaper were barred absent a showing that there was a " . . . substantial possibility that the information sought will expose criminal activity."[7] 466 F.2d at 1083.

---

[7] Judge Wilkinson, in his concurring opinion in the Fourth Circuit, stressed that a grand jury subpoena must serve a "compelling state interest." 829 F.2d at 1305. And even where there is a compelling state interest, restrictions on the First

(Continued on following page)

In *Bursey* the Government's investigation involved an inquiry into persons responsible for the distribution of a newspaper. And that inquiry involved a plan to assassinate the president of the United States. Nevertheless, the court there, in clear language, stressed:

> When Government activity collides with First Amendment rights, the Government has the burden of establishing that its interests are legitimate and compelling and that the incidental infringement upon First Amendment rights is no greater than is essential to vindicate its subordinating interests. 466 F.2d at 1083.

The *Bursey* court went on to emphasize:

> However, it [the Government] is obliged to show that there is a substantial possibility that the information sought will expose criminal activity within the compelling subject matter of the investigation. 466 F.2d at 1083.

Judge Wilkinson, in his concurring opinion in the Fourth Circuit's earlier decision, stressed that the only video-tapes that can be required to be produced before the grand jury in Virginia are those *"substantially* related to the investigation." (App. 51a; emphasis supplied). It is significant that Judge Wilkinson relied on *Bursey v. United States*, 466 F.2d at 1083.

It logically follows that the same principle must apply to documents relating to the video-tapes. If under the

---

(Continued from previous page)

Amendment can be no greater that is essential to further the Government interest. *Citing Branzberg v. Hayes*, 408 U.S. 665 at 680-681 n. 19 (1972); *Bursey v. United States*, 466 F.2d 1059 at 1083 (9th Cir. 1972).

law of this Court the Petitioner cannot be forced to produce the video-tapes without a showing of relevancy, then the same rule should apply to the records of the video-tapes as well. After all, the records associated with the video-tapes are inextricably related to the tapes themselves.

As counsel pointed out to the district court during the August 12, 1988 contempt hearing, once customers of Model throughout New York learn that their records are being delivered to a grand jury in Virginia, they will hesitate to do business with Model. (670) They will understandably become fearful of purchasing any goods from Model once they learn that their sales records have been turned over to a grand jury investigating obscenity. Thus, the chilling effect of producing these records mandates, at the very least, that the prosecutor make some showing of relevance or "compelling need."

Obtaining the names of all of Model's customers and suppliers will certainly impact on its distribution of magazines and books. Here the prosecutor has brazenly stood before the district courts below and boasted that he doesn't have to make any showing before compelling a distributor of books and video-tapes in New York City to produce virtually all of its records before a grand jury in Virginia. (85, 408, 525, 649) In effect, he says they can do anything they please because they are the Government. Well that simply cannot be the law. And this Court should make that clear to prosecutors throughout the United States.

The threat of invoking legal sanctions, implicit in a grand jury investigation, is all the more reason why the broad "record" subpoenas in this case must be quashed.

A grand jury's power of investigation does not carry with it the wholesale authority to issue these broad and sweeping subpoenas. *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 558 (1963). When such wide sweeping investigations are launched into the realm of free expression, we have much to fear. Any assumption that the probable failure of this grand jury investigation will amply vindicate the free circulation of adult materials is unfounded. For we know from experience that "the threat of sanctions may deter . . . almost as potently as the actual application of sanctions. . . ." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

It would be unthinkable to suggest that a prosecutor could subpoena all of the New York Times' books and records and, when that process was challenged on relevancy grounds, the government would not have to make some showing of how these records were connected to its investigation. The fear of an indictment is certainly every bit as inhibiting as the subpoenaing of a few films or books. Judge Wilkenson acknowledged the inhibiting impact of the ad terrorem tactics of subpoenaing a distributor's films. (App. 48a) The seizing of a limited number of books or films will not normally bring the business to a halt. But the subpoenaing of virtually all of the company's books and records is much more debilitating. And therefore, once a subpoena is challenged because the records sought are unrelated to the grand jury investigation, the Government is obliged to illustrate how those records are connected to the inquiry.

The Subpoenaing Of All Of Model's Records Will Impose A Prior Restraint On The Distribution Of Films And Video-Tapes.

Clearly the requiring of Model to produce over 100,000 records before a grand jury in Virginia will impose a prior restraint on their future distribution of video-tapes. As a consequence Model comes under that well established regime of cases that holds that no prior restraint can be imposed upon the circulation of materials protected by the First Amendment without some preliminary showing of why these documents are needed in Virginia. The prevailing rule in this area of the law is that the form of prior restraint is of no consequence. It is the effect that counts. In determining whether or not governmental action constitutes an unlawful prior restraint, it is the substance that must be considered, not the form. *Near v. Minnesota*, 283 U.S. 697, 708 (1931); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963); *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 552-554 (1975).

In *Bantam Books* the prior restraint took the form of a State Commission to Encourage Morality In Youth warning bookstore owners about the sale of certain proscribed books. There the Court emphasized that it would look to the substance of the interference and not the mere method. This Court recognized that freedom of expression is "vulnerable to gravely damaging yet barely visible encroachments." 372 U.S. at 66. The chilling impact of compelling Model to produce all of its lists of customers and suppliers before a grand jury in far off Virginia is manifest when one realizes the disabling effect of such "serious threats of indictment" as acknowledged by the Fourth Circuit. (App. 48a)

In such a case, any lawyer worth his salt will advise clients of Model not to purchase its magazines or books, which are the subject of a grand jury investigation, for fear that they themselves may be prosecuted. (670) Suppliers of films and video-tapes will discontinue furnishing their product to Model if they know that they have been identified before a grand jury. (670) This unwarranted governmental action will effectively inhibit any future distribution of all copies of books and video-tapes.

All of what is said here is bolstered by the acknowledgment that Model stopped doing business in Virginia in 1986, when it learned that it was the subject of a grand jury investigation in that district. (673) Cautious counsel reluctantly advised Model to discontinue all sales in that state because of the fear generated by such a grand jury investigation. (673) What could be better proof of the "chilling" effect of a grand jury's power gone awry. It is for this very reason that this Court, and circuit courts, have held that there must be some establishment of probable cause before there can be any prior restraints or chilling influence imposed upon a distributor of materials presumptively protected by the First Amendment.

What possible relevance can all these documents have to an investigation in Virginia that can, as a matter of law, only be related to a handful of video-tapes that were sold in that jurisdiction before 1986? The simple answer must be that the law requires some demonstration that there is some basis for commanding a company engaged in a protected business to produce all of its records before a grand jury in a far off jurisdiction. That is all that the Petitioner suggests must be done.

No one is urging that Model's records are immune from discovery because they are engaged in activity that is protected by the First Amendment. We urge that before they can be subjected to such official demands – that inevitably chill the exercise of free expression – there must be a substantial showing of how it is that all these records are relevant to a grand jury investigation in Virginia.[8] Certainly such a requirement does not impose an unbearable burden upon the Government and at the same time it affords the public the fundamental protections guaranteed by the First Amendment.

Those who distribute adult materials are inhibited from doing so by the threat of such an all-encompassing and unauthorized seizure of all their business records and customer lists. It is for this reason that the "all papers" subpoena in this case must be carefully scrutinized. Why can't the subpoenas in this case request banking records that relate to business transactions in

---

[8] The federal venue statute and the Constitution mandate that a person must be indicted in the place where the crime is committed. In terms of obscenity, this requires that a person be indicted either in the place to which the shipment is made, or the place from which it is made, or any place through which the material travels. Therefore, a grand jury sitting in the Eastern District of Virginia could not indict for a shipment or for mailing within New York or between any northeastern states. The Virginia grand jury could not properly indict for any Model shipment after October 1986, because there have been no shipments to Virginia since that time. 18 U.S.C. 3237; F.R. Cr.P. Rule 18; *United States v. Peraino*, 645 F.2d 548 at 551 (6th Cir. 1981); *United States v. McManus*, 535 F.2d 460 (8th Cir. 1976); *United States v. Bagnell*, 679 F.2d at 830-832 (11th Cir. 1982).

Virginia? Why can't the demand for purchases of materials for resale be limited to those that were shipped to Virginia? By what right does a prosecutor demand *all* the sales records and *all* the banking records of a company that distributes 99% of its materials outside the state of Virginia?

The Fourth Amendment Relevancy Requirement

Even if this case only implicated the Fourth Amendment, this Court has recognized that there must be some showing of relevancy before a massive demand for documents will be judicially condoned. *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 306 (1924).[9] The rule followed in most jurisdictions provides that when the subject of a subpoena makes a motion to quash that process, asserting good-faith complaints concerning the matter of relevance, the Government is obliged to indicate how the records challenged are relevant to the investigation. And when the subject of the grand jury investigation implicates First Amendment concerns, the obligations imposed upon the Government are all the greater. For instance, this Court's decision in *Stanford v.*

---

[9] In the *American Tobacco* case, this Court relying exclusively on the Fourth Amendment, held "[i]t is contrary to the first principles of justice to allow a search through all [a corporation's] records, relevant or irrelevant, in the hope that something will turn up." 264 U.S at 306. The powers of the FTC are analogous to that of a grand jury. *United States v. Morton Salt Co.*, 338 U.S. 632, 642-643 (1950).

Texas, 379 U.S. 476 (1965), holding that the First Amendment requires that the Fourth Amendment be applied with "scrupulous exactitude," is most compelling. As a consequence, even if the First Amendment were not implicated in this case, the Government would have to demonstrate some degree of relevance when Model attacks the subpoena under the Fourth Amendment.

There is a well-established colony of cases that requires a showing of compelling governmental interest and holds that justifiable goals may not be achieved by unduly broad means before the production of business records of an enterprise engaged in First Amendment activities can be enforced. In addition, the right to publish and distribute unpopular literature guaranteed by the First Amendment protects publishers, distributors, their employees and their suppliers and customers from inquiry concerning their identity in cases where there is no showing of a compelling need. *NAACP v. Alabama*, 357 U.S. 449 (1958); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 558 (1963); *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972); *People v. Mishkin*, 17 A.D.2d 243, 234 N.Y.S.2d 342 (1st Depart, 1962) aff'd 15 N.Y.2d 671, 255 N.Y.S.2d 881 (1964); *Natco Theaters, Inc. v. Ratner*, 463 F. Supp. 1124 (S.D.N.Y. 1979).

The presiding spirit of the "anonymity case law" supports the position of Model. The production of the names and addresses of all its employees, suppliers and customers is unauthorized unless there is some showing that the grand jury is investigating, for instance, paperback book dealers in New York City or video stores in Yonkers, New York.

If Model can be investigated for shipments it does not make into Virginia, it raises the obvious threat that anyone who deals with Model will be subjected to the same harassment. Requiring Model to divulge all the names of its vendors and customers exposes it to this very jeopardy and risk of reprisal, which is one justification for anonymity. It should be emphasized that the potential deprivation of First Amendment rights is *per se* irreparable without regard to any economic loss. For this additional reason, the Court should grant this cross-petition for certiorari.

And finally, it must be said that no one questions a prosecutor's right to investigate the distribution of allegedly obscene materials. Model claims no immunity from such an inquiry. All that is asked here is that such an inquisition be conducted in a manner compatible with the constitutional requirements of the Fourth and First Amendments. In this way, a judge can preliminarily determine the necessity of the restraints imposed upon a distributor of books and video-tapes and decide whether the invasion of privacy is warranted. Such a procedure protects the public from unwarranted deprivation of information and yet guarantees to the prosecutor the right to continue an investigation which may be legally justified. Once a court makes a determination that there is or not justification, we have the satisfaction of knowing that the inquisition has "operated under judicial superintendence," with the assurance of "an almost immediate judicial determination of the validity of the restraint." *Bantam Books v. Sullivan, supra,* 372 U.S. at 70.

To summarize our case in a few words, there is no way a federal prosecutor can possibly justify requiring

Model to produce all of these documents to a grand jury sitting in Virginia, for all those records relate to the distribution of presumptively protected literature outside of Virginia. Not only is this action unauthorized, but it will impose an impermissible prior restraint on the distribution of books and films to a public outside the confines of the Eastern District of Virginia.

CONCLUSION

The cross-petition for certiorari should be granted.

Respectfully submitted,

HERALD PRICE FAHRINGER
DIARMUID WHITE
540 Madison Avenue
New York, New York 10022

RALPH J. SCHWARZ, JR.
122 E. 42nd Street,
New York, New York 10168

Attorneys for Model Magazine Distributors, Inc.

April 13, 1990

No. 89-1606

In the Supreme Court of the United States

OCTOBER TERM, 1989

MODEL MAGAZINE DISTRIBUTORS, INC., CROSS-PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
LAWRENCE S. ROBBINS
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals correctly upheld the denial of a motion to quash a grand jury subpoena for corporate business records, after concluding that the subpoenaed records were relevant in that they would "most likely reveal whether [cross-petitioner's] business dealings in Virginia resulted in the sale and or distribution of allegedly obscene materials in the state."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and rule:

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1606

MODEL MAGAZINE DISTRIBUTORS, INC., CROSS-PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 884 F.2d 772.[1] Earlier opinions of the court of appeals (Pet. App. 16a-18a, and 19a-56a) are reported, respectively, at 844 F.2d 202, and 829 F.2d 1291.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1989. A petition for rehearing was denied on December 12, 1989 (Pet. App. 68a-69a). The government's petition for a writ of certiorari was filed on March 12, 1990,

---

[1] References to "Pet. App." are to the appendix to the government's petition for a writ of certiorari in *United States* v. *R. Enterprises, Inc., and MFR Court Street Books, Inc.*, No. 89-1436.

and was served on March 14, 1990. The cross-petition was filed on April 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Since 1986, a grand jury sitting in the Eastern District of Virginia has been investigating allegations of interstate transportation of obscene materials. In early 1988, the grand jury issued a series of subpoenas to cross-petitioner Model Magazine Distributors, Inc. (Model), and two related companies, R. Enterprises, Inc., and MFR Court Street Books, Inc. (MFR).[2] The subpoenas sought a variety of corporate books and records. See Pet. App. 3a, 70a-82a. The grand jury subsequently issued two further subpoenas to Model. The first called for additional business records; the second requested one copy of each of 193 identified videotapes that Model had shipped into the Eastern District of Virginia. *Id.* at 83a-84a; see *id.* at 4a.

2. The companies moved to quash the subpoenas. Following extensive hearings in the United States District Court for the Eastern District of Virginia, the motions to quash were denied.

First, on June 17, 1988, Judge Hilton denied Model's motions to quash. Pet. App. 57a-58a. The court found that the two subpoenas for business records were sufficiently specific. *Ibid.* It also upheld the subpoena for the 193 videotapes, concluding that the tapes were relevant to the government's investigation and that production of the tapes would not constitute a prior restraint. *Ibid.*

---

[2] The government had earlier sought to subpoena certain corporate records and videotapes in the possession of Model and another company, but the court of appeals had held those subpoenas to be too broad and too vague, and had refused to compel compliance with the subpoenas. See Pet. App. 19a-56a.

Second, on July 8, 1988, Judge Cacheris denied the motion by R. Enterprises to quash the subpoena for business records. Pet. App. 59a-60a. The court found that the subpoena was "clearly delineated and not overly burdensome." *Id.* at 59a. The court also found a "sufficient connection" between R. Enterprises and the Eastern District of Virginia to warrant "further investigation by the grand jury." *Id.* at 60a. In particular, the court noted that Martin Rothstein, the owner of R. Enterprises, had admitted that R. Enterprises, MFR Books, and Model were "all the same thing." *Ibid.*

Finally, on August 12, 1988, Judge Ellis denied MFR's motion to quash the subpoena for business records. Pet. App. 61a-64a. The court stated that it was "inclined to agree" with "the majority of the jurisdictions," which do not require the government to make "a threshold showing" before a grand jury subpoena may be enforced. *Id.* at 63a. The court added, however, that "even assuming that the Fourth Circuit would require a threshold showing of relevance," the government had made such a showing in this case. *Ibid.* The court found sufficient evidence that respondents were "related entities," at least one of which "certainly did ship sexually explicit material into the Commonwealth of Virginia." *Ibid.* The court also found the subpoena to be appropriately "tailored." *Ibid.* Characterizing the subpoenas in this case as "fairly standard business subpoenas," which "ought to be complied with," *id.* at 65a, the district court denied the motion to quash. When the companies thereafter refused to comply, the court found them in contempt. *Id.* at 64a.

3. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-15a. Relying on *United States* v. *Nixon*, 418 U.S. 683 (1974), the court held that, pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure, the government must "clear three hurdles" in order to secure

the enforcement of a grand jury subpoena: (1) relevancy; (2) admissibility; and (3) specificity. Pet. App. 7a.[3] The court emphasized that unless grand jury subpoenas are held to such a threshold standard, they might be used as "a means of discovery in addition to that provided by Fed. R. Crim. Pro. 16." *Id.* at 9a. "The test for enforcement," the court explained, "is whether the subpoena constitutes 'a good faith effort to obtain identified evidence rather than a general "fishing expedition" that attempts to use the rule as a discovery device.' " *Ibid.* In order not to "undercut[ ] the strict limitation of discovery in criminal cases," *ibid.*, the court held that "any documents subpoenaed under Rule 17(c) must be admissible as evidence at trial." *Id.* at 10a.

Applying those standards, the court first upheld the subpoenas to Model for business records. Pet. App. 7a-8a. It found the requested records to be sufficiently relevant because they would "most likely reveal whether the company's business dealings in Virginia resulted in the sale and or distribution of allegedly obscene materials in the state." *Id.* at 8a. In addition, the court had no doubt of "the necessity of a subpoena to obtain those records, as logically they are available only from the company itself." *Ibid.*

The court, however, quashed the subpoenas for the business records of MFR and R. Enterprises. Pet. App. 8a-10a. The court explained that the government had adduced no evidence that those companies had done business in the Eastern District of Virginia; the court therefore "fail[ed] to see how the records of those companies are relevant to a grand jury investigation" in the district. *Id.* at 9a. In addition, the court stated, any evidence of activities by

---

[3] The court of appeals recognized that the *Nixon* Court was not reviewing a subpoena duces tecum in connection with a grand jury investigation, but it found the interpretation of Rule 17(c) articulated in the *Nixon* case "equally applicable in this case." Pet. App. 7a n.2.

the target companies outside the State of Virginia "would most likely be inadmissible on relevancy grounds at any trial that might occur." *Id.* at 10a. Accordingly, the court held, the subpoenas "fail to meet the requirement[ ] that any documents subpoenaed under Rule 17(c) must be admissible as evidence at trial." *Ibid.*

Finally, the court remanded Model's motion to quash the subpoena for videotapes. Pet. App. 10a-15a. The court held that the subpoenaed films were not shown to be obscene and that the government had failed to establish the relevance of the films to the grand jury's investigation. *Id.* at 12a-14a & n.4. It also noted that there were "additional means for obtaining these tapes other than the issuance of a subpoena duces tecum and an *in camera* review by the district court." *Id.* at 13a.

ARGUMENT

Cross-petitioner contends that, as "a wholesale distributor of adult magazines, paperback books, and video tapes" (Pet. 3), it was entitled to "stringent" (Pet. 9) protection against grand jury subpoenas for its corporate books and records. In particular, cross-petitioner asserts, "some showing of relevance must be made before such a massive demand for documents is authorized." *Ibid.* Cross-petitioner contends that "once a subpoena is challenged because the records sought are unrelated to the grand jury investigation, the Government is obliged to illustrate how those records are connected to the inquiry." *Id.* at 12.

In fact, however, cross-petitioner has no real disagreement with the legal standard applied by the court of appeals. Indeed, cross-petitioner was the beneficiary of a legal standard even more generous than the one it now seeks, yet it nevertheless lost its motion to quash. In denying Model's motion to quash the subpoena for corporate records, the

court below held that "documents subpoenaed under Rule 17(c) must be admissible as evidence at trial" (Pet. App. 10a), and not merely relevant to a grand jury investigation. The court of appeals reasoned that unless grand jury subpoenas are held to such a strict threshold standard, they might be used as "a means of discovery in addition to that provided by Fed. R. Crim. Pro. 16." Pet. App. 9a. Applying those standards, the court nonetheless upheld the subpoenas to Model for business records. *Id.* at 7a-8a. It found the requested records to be sufficiently relevant because they would "most likely reveal whether the company's business dealings in Virginia resulted in the sale and or distribution of allegedly obscene materials in the state." *Id.* at 8a.[4] In addition, the court had no doubt of "the necessity of a subpoena to obtain those records, as logically they are available only from the company itself." *Ibid.*

In our petition in No. 89-1436, we have contended that the court of appeals' decision—requiring that documents subpoenaed by a grand jury be relevant and admissible at trial—is mistaken.[5] But whatever the disposition of our

---

[4] In light of the court of appeals' conclusion, there is no basis for cross-petitioner's complaint that the government was not required to show how the subpoenaed records "are relevant to a grand jury investigation in Virginia" (Pet. 15).

[5] Cross-petitioner relies on First Amendment principles in defending a "stringent" relevance standard for grand jury subpoenas. Cross-petitioner does not, however, explain why the First Amendment provides any protection to routine corporate records (as opposed to the actual videotapes). Although cross-petitioner asserts that the subpoena "will effectively inhibit any future distribution of all copies of books and video-tapes" (Pet. 14), it offers no support for that prediction. And "[b]are allegations of possible first amendment violations are insufficient to justify judicial intervention into a pending investigation." *Dole v. Milonas*, 889 F.2d 885, 891 (9th Cir. 1989).

In any event, even if the First Amendment were applicable to Model's corporate books and records, it would not insulate cross-petitioner from

petition, there is no reason to grant Model's cross-petition. Model benefited from a highly "stringent" (Pet. 9) standard of relevance, and it nonetheless lost its motion. Thus, Model's quarrel is not with the legal standard adopted by the court below, but rather with that court's application of the standard to the subpoenas for Model's corporate books and records. That fact-bound decision warrants no further review.

---

the duty to respond to a grand jury subpoena. As this Court explained in *Branzburg* v. *Hayes*, 408 U.S. 665, 682 (1972), "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability." Applying that principle, the Court in *Branzburg* held that the First Amendment does not shield a reporter from having to answer a grand jury's questions concerning an ongoing criminal investigation. See also *Herbert* v. *Lando*, 441 U.S. 153 (1979) (no special exemption for the media from the general rules of pretrial discovery); *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978) (no special immunity for the press from search warrants); *SEC* v. *McGoff*, 647 F.2d 185 (D.C. Cir.) (upholding subpoena issued by the Securities and Exchange Commission for corporate records relating to transactions with South Africa), cert. denied, 452 U.S. 963 (1981); *In re Grand Jury Matter (Gronowicz)*, 764 F.2d 983, 989 (3d Cir. 1985) (Garth, J., concurring), cert. denied, 474 U.S. 1055 (1986).

CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
LAWRENCE S. ROBBINS
Assistant to the Solicitor General

MAY 1990

U.S. GOVERNMENT PRINTING OFFICE: 1990—262-203/00853

No. 89-1606

In The

Supreme Court of the United States

October Term, 1989

MODEL MAGAZINE DISTRIBUTORS, INC.,

Cross-Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

CROSS-PETITIONER'S REPLY BRIEF

HERALD PRICE FAHRINGER
DIARMUID WHITE
540 Madison Avenue
New York, New York 10022
(212) 751-1330

RALPH J. SCHWARZ, JR.
RICHARD S. BROWN, JR.
21 East 40th Street
New York, New York 10016
(212) 532-0911

Attorneys for Cross-Petitioner Model Magazine Distributors, Inc.

May 18, 1990

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

No. 89-1606

In The

Supreme Court of the United States

October Term, 1989

MODEL MAGAZINE DISTRIBUTORS, INC.,

Cross-Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

CROSS-PETITIONER'S REPLY BRIEF

Model cross-petitioned because the Court of Appeals opinion rejected our First Amendment arguments and directed the production of Model business records which had no connection with Virginia.[1] Model's complaint is that the Fourth Circuit ignored the First Amendment

[1] The same First Amendment issue concerning business records is presented by the companion case of *United States v. R. Enterprises, Inc. and MFR Court Street Books, Inc.*, #89-1436.

implications and the principle which Model contends is controlling.[2]

Nonetheless, in an attempt to block this Court's review of an important issue, the government presumptuously argues that Model "has no real disagreement with the legal standard applied by the Court of Appeals" (Gov. Ans. p. 5,7). This is simply not so. Model's cross-petition complains about the Fourth Circuit's failure to apply proper First Amendment standards. Our objection to a rule of law applied by the Fourth Circuit clearly involves a legal standard eligible for review by this Court.

The Fourth Circuit held that Model's business records were relevant to the investigation of shipments to Virginia because those records would "most likely reveal whether the company's business dealings *in Virginia* resulted in the sale * * * of allegedly obscene material" in that state. (App. 8a,[3] emphasis supplied). Model, however, did not object to delivery of its business records which reflected sales to Virginia.[4] Model's complaint is

---

[2] None of the cases relied upon by the Fourth Circuit involved an investigation of First Amendment activities.

Although Part III of *United States v. Cuthbertson*, 630 F.2d 139, 146-149 (3rd Cir 1980) did involve a subpoena for First Amendment material in a fraud indictment, significantly the Fourth Circuit did *not* rely on any part of the *Cuthbertson* First Amendment holding. Instead the Fourth Circuit held only that "mere hope" did not justify a subpoena under Rule 17(c). (App. 9a)

[3] Refers to page numbers of the Government Appendix in 89-1436.

[4] In fact Model did deliver all of its records showing sales into Virginia.

that under combined principles of the First and Fourth Amendments it should not be compelled to deliver virtually all of its business records without any showing they are connected to Virginia. This is the novel First Amendment issue which should be reviewed, and which the Government refused to address.

The Solicitor General relies on the language "the First Amendment does not invalidate every incidental burdening of the press * * * " *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972). (Gov. Ans. pg. 7 ftn. 5). However, *Branzburg* sustained the grand jury subpoenas over First Amendment claims because the information sought related "directly" to the criminal conduct being investigated (408 U.S. at 701, 708). Clearly under the spirit of *Branzburg* there must be a showing of some possibility that the information sought by the subpoena will expose criminal activity. *Bursey v. United States*, 466 F.2d 1059 at 1083 (9th Cir. 1972). The government has never furnished any explanation as to how Model's sales to stores in the Northeast part of the United States is relevant to any alleged unlawful conduct in Virginia.

In addition the Solicitor General does not dispute that compliance with the subpoena will compel delivery of over 50,000 documents which have no conceivable connection with Virginia. The Government does not furnish any explanation as to just why this is an incidental burden on the First Amendment. Further, the Government does not answer Model's point that the compelled disclosure of the identity of all Model customers, having

nothing to do with Virginia, is precisely the type of injury that the First Amendment is designed to prevent.[5]

CONCLUSION

The cross-petition for certiorari should be granted.

Respectfully submitted,

HERALD PRICE FAHRINGER
DIARMUID WHITE
540 Madison Avenue
New York, New York 10022
(212) 751-1330

RALPH J. SCHWARZ, JR.
RICHARD S. BROWN, JR.
21 East 40th Street
New York, New York 10016
(212) 532-0911

Attorneys for Cross-Petitioner

May 18, 1990

[5] *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *Bursey v. United States*, 466 F.2d at 1083, 1085.